UNITED MALAYAN BANKING CORP. BHD.

v.

WARISAN NIAGA (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[SUIT NO. C7874 OF 1985]
26 JANUARY 1990

LEGAL PROFESSION: *Undertaking by advocate & solicitor - Clear and express - Effect of undertaking - Standard required - Rules of construction.*

The plaintiff had financed a project and granted a term loan to the 1st defendant, one of the terms and conditions of the loan being that the 6th defendant (who was the solicitor for the developers) give a letter of undertaking to the plaintiff that he (the 6th defendant) would be responsible for the repayment of the loan if the 1st defendant defaulted in meeting the payments. The 1st defendant did default and an O. 14 judgment was obtained.

The issue for determination in this appeal by the 6th defendant is the interpretation to be given to the letter of undertaking executed by the 6th defendant.

Held:

[1] The principles of construction to be applied to an undertaking are best described by Hashim Yeop A. Sani FJ (as he then was) in *Michael C. Solle v. United Malayan Banking Corporation* [1984] 1 CLJ (Rep) 267.

[2] (a)Any undertaking given by a solicitor must be clearly worded so as to express the intentions of both parties.

(b) it is for the solicitor to consider the probable effect of such instrument before he signs it for the language of an instrument is to be taken most strongly against the party using it.

(c) the fact that subsequent to the undertaking events occur which alter the position such as his client withdrawing or changing his instructions before the undertaking has been honoured will not entitle the solicitor to avoid liability unless he has expressly guarded against those event in the undertaking itself.

(d) the standard required is so high that the Courts have allowed only one defence that of mistake.

The above principles were expressed in *Re Choe Kuan Him* [1975] 2 MLJ 274.

[3] The undertaking executed by the 6th defendant is expressed in very clear and unambiguous language and there is no precondition attached to it before liability can be established.

[Appeal dismissed]

Cases referred to:
Michael C. Solle v. United Malayan Banking Corporation [1984] 1 CLJ (Rep) 267
Re Choe Kuan Him [1975] 2 MLJ 274

Legislation referred to:
Rules of the High Court 1980, O. 14

For the 6th defendant/appellant - R. John; M/s. Atma Singh Veriah & Co.
For the plaintiff/respondent - P. Chen; M/s. Allen & Gledhill

JUDGMENT

Siti Norma Yaakob J:

The only issue for determination in this appeal by the 6th defendant against an O. 14 judgment, is the interpretation to be given to the letter of undertaking dated 28 June 1984 executed by him.

The 6th defendant is an advocate and solicitor and practises under the firm name of Messrs Syed Ibrahim & Co., of which he is the sole proprietor. In that capacity he had acted for the developers of a housing project known as "Taman Sangsura" in Kuala Trengganu.

The plaintiff had financed the project and granted a term loan of RM120,000 to Warisan Niaga (M) Sdn. Bhd., the 1st defendant in the suit and the owner of the property on which the houses were to be constructed. One of the terms and conditions of the loan is that the 6th defendant, as the solicitor for the developers, engaged by the 1st defendant to develop their land, shall give an undertaking to the plaintiff that he will be responsible for the repayment of the loan by the 1st defendant. The 1st defendant defaulted in meeting its obligations to repay the loan and the housing project has since been aborted and it is under these circumstances that the plaintiff now seeks to enforce the undertaking which is worded in the following manner:

> 28 June 1984.
> The Manager,
> United Malayan Banking Corporation Berhad,
> Kuala Lumpur Main Office,
> Bangunan UMBC, Jalan Sultan Sulaiman,
> Kuala Lumpur.
>
> Dear Sir,
>
> Re: Fixed Loan of RM120,000 favouring Warisan Niaga (M) Sdn. Bhd.
> Letter of Undertaking
>
> With reference to the above matter, we hereby undertake to be responsible for the payment of the above loan given to Warisan Niaga (M) Sdn. Bhd., for the developer - Woodstone Development (M) Sdn. Bhd.
>
> Thank You.
>
> Yours faithfully
>
> Sgd. xxx

In disputing liability, the 6th defendant avers that there is precondition attached to the undertaking before his liability can be established and this precondition is the receipt by him of the progress payments from purchasers of the housing project, which however never reached him as the project had been aborted.

The principles of construction to be applied to an undertaking are best described by Hashim Yeop A. Sani FJ, as he then was, in the case of *Michael C. Solle v. United Malayan Banking Corporation* [1984] 1 CLJ (Rep) 267 as follows:

> The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement.

Now when that undertaking is given by a solicitor, his obligations and liability have already been expressed in the case of *re Choe Kuan Him* [1975] 2 MLJ 274 as follows:

> An undertaking given by a solicitor is very often the decisive factor in inducing its acceptance. Great care ought therefore to be paid to the wording of an undertaking both by the solicitor giving it and by the person accepting. It must be clearly worded so as express the intentions of both parties and this is all the more so when the undertaking is given to a person who is not a solicitor. It is for him to consider the probable effect of such instrument before he signs it for the language of an instrument is to be taken most strongly against the party using it. The fact that subsequent to the undertaking events occur which alter the position, such as his client withdrawing or changing his instructions before the undertaking has been honoured, will not entitle the solicitor to avoid liability unless he has expressly guarded against those events in the undertaking itself. The standard required is so high that the Courts have allowed only one defence, that of mistake.

Turning to the undertaking that had been executed by the 6th defendant, it is expressed in a very clear and unambiguous language, and despite what had been submitted before me, I see no precondition attached to it before liability can be established. It is very clear in intent and meaning. It was given by him in his professional capacity as such, and since he is the sole proprietor of his firm, he cannot now deny liability on the grounds of some precondition that does not appear in the undertaking itself. For these reasons, I had dismissed his appeal with costs and for obvious reasons, I had also refrained from making any order on another appeal filed by him against the order of the Senior Assistant Registrar dismissing his application for a stay of execution pending the disposal of his appeal against the O. 14 judgment.

Also found at [1990] 2 CLJ 110